
Judiciary Committee

HB 1859

Title: An act relating to compensation for birth-related injuries.

Brief Description: Creating the Washington birth-related injury compensation association.

Sponsors: Representatives Lantz, Cody, Schual-Berke, Morrell, Kirby, Springer, Miloscia, Kilmer, Upthegrove, Linville, Chase, Wood and Kagi.

Brief Summary of Bill

- Establishes a no-fault system for providing compensation for certain birth-related injuries.

Hearing Date: 2/14/05

Staff: Edie Adams (786-7180).

Background:

A person who is wrongly injured or killed by another person's negligence is entitled to seek compensation for the injury or death through the civil tort system. The Legislature has established particular rules relating to actions for injuries or death resulting from the provision of health care, or medical malpractice. There are three grounds on which a health care provider may be found liable in a medical malpractice action: (1) the health care provider failed to follow the standard of care; (2) the health care provider promised that the injury suffered would not occur; or (3) the injury resulted from health care to which the patient did not consent.

In the arena of workplace injuries, the Legislature has created a no-fault system that replaces the traditional tort system. This industrial insurance system is a no-fault state program that provides medical and partial wage replacement benefits to workers who are injured on the job or who develop an occupational disease. Employers must either insure with the State Fund or qualify as a self-insurer. The Department of Labor and Industries (L&I) operates the State Fund and regulates self-insured employers. L&I orders may be appealed to the Board of Industrial Insurance Appeals. Generally, employers subject to the industrial insurance law are immune from civil liability for nonintentional workplace injuries and diseases.

The states of Florida and Virginia have established no-fault systems for compensating certain birth-related neurological injuries. In both states, the systems carve out the most serious birth-related injuries that render the child seriously and permanently disabled. In addition, the systems only apply to deliveries by participating physicians and participating hospitals (in Florida,

hospital participation is mandatory). If a birth-related injury qualifies, the systems provide the exclusive remedy for the injury. The systems are funded through assessments on physicians and hospitals, assessments on liability insurance carriers, and legislative appropriation (in Florida).

Summary of Bill:

The Washington Birth-Related Injury Compensation Plan (Plan) is established. The purpose of the Plan is to provide compensation for certain birth-related injuries regardless of whether the injury was caused by the fault of a health care provider. The Plan is administered by the Washington Birth-Related Injury Compensation Association (Association). The Association consists of a board of seven directors who are appointed by the Governor. The Association must submit its plan of operation and annual audited financial reports to the Office of the Insurance Commissioner (OIC).

The remedies provided by the Plan are exclusive and preclude any other civil right of action arising out the injury except where the acts or omissions that led to the injury were made in bad faith, with malicious purpose, or with willful or wanton disregard of human rights, safety, or property.

Birth-Related Injury

A birth-related injury that is compensable under the Plan is defined as an injury to a live infant at birth that:

- is caused by oxygen deprivation or mechanical injury;
- occurs during the course of labor, delivery, or resuscitation in the immediate post-delivery period;
- occurs in a hospital or childbirth center; and
- renders the infant permanently and significantly mentally or physically impaired in a major life activity.

Claim Process

The Board of Industrial Insurance Appeals (Board) is given authority to hear and determine claims for compensation under the Plan. The Board has exclusive jurisdiction to determine whether an injury is a birth-related injury compensable under the Plan.

A claimant initiates a claim for compensation under the Plan by filing a petition with the board. A claim for compensation must be made no later than eight years after the birth of the infant, or the claim is barred.

The petition must include specified information, including the identity of the health care providers and the hospital or childbirth center involved in the birth. The claimant must include enough copies of the petition so that the Board can serve the Association with a copy of the petition and mail copies of the petition to the Department of Health (DOH), the providers involved in the birth, and the hospital or childbirth center where the birth occurred.

Within 10 days of filing a petition with the Board, the claimant must provide the Association with the following information: medical records relating to the injury; any assessments or evaluations useful for determining appropriate compensation for the injury; documentation of already incurred expenses; and documentation of any sources of services or reimbursement for the injury.

The Association must, within 45 days of service of the petition, submit a response to the Board that includes information regarding whether the injury qualifies as a birth-related injury.

Hearing

The Board must set a hearing on the petition at least 60 days and no more than 120 days after the filing of the petition. The claimant and the Association are the parties to the proceeding. The parties are entitled to discovery as authorized by the Board prior to the hearing and may present evidence and cross-examine witnesses at the hearing.

After the hearing, the Board must determine whether the injury is a birth-related injury and if so, how much compensation to award under the Plan. An injury is presumed to be a birth-related injury if the claimant shows: the infant sustained an injury at birth caused by oxygen deprivation or mechanical injury; and the infant was permanently and significantly mentally or physically impaired in a major life function as a result.

If the Board determines that the claimant is entitled to compensation under the Plan, the Board must make an award for the following items:

- actual expenses for medical care, rehabilitation and training services, family residential and custodial care, special equipment and facilities, and related travel;
- periodic payments of an award up to \$100,000;
- death benefit of \$10,000 for an infant who died as a result of the injury; and
- reasonable expenses and reasonable attorneys' fees incurred in bringing the claim.

The award may not include compensation for health care services that are covered by a health insurer or by public health programs. The award shall require the Association to pay already incurred expenses immediately and all future expenses as they are incurred.

The order of the Board as to whether the injury is a birth-related injury and the amount of the award may be appealed to the Court of Appeals. If the Board's order included an award of compensation under the Plan, payment of the award is suspended until the appeal is final.

Funding of the Plan

Funding for the Plan is provided through assessments on health care providers, hospitals and childbirth centers, potential assessments on casualty insurers, and any legislative appropriations for the Plan.

Hospitals and childbirth centers must pay an annual assessment of \$50 per infant delivered in the hospital or childcare center during the prior year. Physicians, osteopathic physicians, and advanced registered nurse practitioners, with some exceptions, must pay an annual assessment of \$500.

Casualty insurers may be required to pay an annual assessment into the Plan if the assessments on hospitals, childbirth centers, physicians, and advanced registered nurse practitioners, and any money appropriated by the Legislature, are insufficient to maintain the Plan. The OIC determines the amount of assessment on casualty insurers in proportion to their share of the casualty insurance market, but in no case to exceed 0.25 percent of that insurer's net direct premiums written. The OIC is required to perform an actuarial evaluation of the Plan at least biennially and to use the results of the evaluation to determine the appropriate assessments on casualty insurers.

The Association must suspend the acceptance of new claims into the Plan if the estimated costs of claims and other expenses equals 80 percent of the funds on hand and the funds that will be received over the next 12-month period.

Patient Safety Measures

The Association and the DOH must collaborate to monitor and analyze the claims submitted under the Plan in an attempt to detect patterns of practice or care that lead to birth-related injuries. The DOH may issue recommendations regarding changes in patterns of practice to reduce the incidence of birth-related injuries.

The DOH must review the petitions filed under the Plan to determine whether the claim involved a violation of hospital or childbirth center licensing statutes or rules. In addition, a disciplining authority that receives a copy of a petition filed under the Plan must review the petition to determine whether the claim involved conduct subject to disciplinary action under the Uniform Disciplinary Act.

Appropriation: None.

Fiscal Note: Requested on February 8, 2005.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.